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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 624

JOHN R. HENDRICKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (XVI. 4–6; Pet. App. 1–3) is reported at 295 F. 2d 63.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1961 (XVI. 7; Pet. App. 4). A petition for rehearing was denied on October 26, 1961

[1] The record consists of 16 volumes. Volumes 3 to 15, which are consecutively paginated, constitute the reporter's transcript of the trial and will be referred to as "Tr.". Volumes I, II and XVI, which are separately paginated, constitute various papers filed in the district court, the *voir dire* examination of the jury, and the proceedings in the court of appeals, respectively, and will be referred to by appropriate volume number.

(XVI. 18). Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari to December 23, 1961, and the petition was filed on December 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether questioning of witnesses by the trial court deprived the petitioner of a fair trial.

STATEMENT

A 26-count indictment returned in the District Court for the Southern District of California charged the petitioner with having aided and abetted one George Hewlett to abstract and misapply funds and credits of the Long Beach National Bank from December 1953 through April 1959, and with having conspired with Hewlett to commit those offenses, in violation of 18 U.S.C. 371 and 656 (I. 2–36). Hewlett, who was cashier of the Long Beach bank from 1953 to 1959, had committed suicide before return of the indictment (Tr. 45, 134, 1444–1445). Following a trial by jury, the petitioner was found guilty as charged (I. 142, 143–144; Tr. 2235–2240). On April 11, 1960, he was sentenced to consecutive five-year terms of imprisonment on each of five counts, making a total sentence of twenty-five years (I. 145–147; Tr. 2274).[1] On appeal, the conviction was unanimously affirmed (XVI. 4–6, 7; Pet. App. 1–3, 4).

The pertinent facts may be summarized as follows:

1. On April 20, 1959, the United States National Bank of San Diego purchased and took over the oper-

[1] Imposition of sentence was suspended on the remaining 21 counts (I. 145).

ations of the Long Beach National Bank of California (Tr. 47–48). An audit of the books and records of the Long Beach bank revealed shortages of over $3,700,000 (Tr. 81–83, 89). Petitioner, in behalf of himself and various corporations of which he was the president, stipulated to entry of judgment for $3,714,710.96 in an action for conversion brought by the bank (Tr. 97–105).

As part of their preparation for the criminal trial, counsel for both sides as well as the petitioner stipulated (I. 44–70) that from December 1953 to April 1959 a total of 517 cashier's checks were issued by the Long Beach bank to the petitioner and others, including corporations in which the petitioner was interested as owner, president or in some other official capacity (Tr. 102, 401–406), and that the bank did not receive payment or consideration for 371 of those checks.[3] False debit entries were made, apparently by Hewlett, in the bank records as to the 371 checks (I. 44–45). During this period, the petitioner on numerous occasions sent various employees to the Long Beach bank to contact Hewlett for the receipt and return of sealed envelopes for the petitioner (Tr. 522–527, 836–842, 846–847). On many of these trips, the petitioner sent envelopes to Hewlett. A telephone operator at the Long Beach bank testified that from about February 1956 to March or April 1959, the petitioner telephoned Hewlett approximately two times each week, and that after March or April 1959, the petitioner telephoned Hewlett about five times each day (Tr. 110–112).

[3] Of the 371 checks, 285 were issued either to the petitioner (125 checks) or to corporations (160 checks) in which he had official interests.

In a financial statement submitted to a finance company in 1954, the petitioner claimed that his net worth was a little over $18,000 (Tr. 357). By July 31, 1958, the petitioner claimed that his net worth was over $1,900,000 (Tr. 379). He told a finance company in December 1955 that he had oil wells in Oklahoma, and that he had just completed a "three million dollar deal" with the Standard Oil Company (Tr. 361). In conversations with others during this period, the petitioner said that an investment group from San Rafael, California, constituted his "source of income" (Tr. 149–152, 242). He told an employee that he had received $50,000 from friends and relatives in the Los Angeles area (Tr. 237, 241–242). He told a business associate, one Philip Kennedy, that the funds came from friends in the Los Angeles area (Tr. 463–466). To others, the petitioner said that his financing came from Kennedy (Tr. 212–218, 635–636). To a personal friend, the petitioner said that he and Hewlett were partners in about thirty-five or forty very successful business ventures, including out-of-state oil wells (Tr. 127–130).

The petitioner testified that he believed that Hewlett was investing private funds in the business ventures. He said that he earned about $1,500,000 between 1954 and 1959 from sales of investment property and from "[m]onies received from Mr. Hewlett that [were] supposedly coming from investors" (Tr. 1637–1638, 1673). He said that he and various corporations in which he had interests, which subsequently became complete financial failures, sold investment property to Hewlett's investors and others (Tr.

1672–1674). The petitioner testified that he earned about $200,000 or $250,000 in 1955 and 1956 on the sale of investment properties (Tr. 1674). When confronted with his income tax returns for 1955 and 1956, the petitioner said that he had been "confused" earlier, that his testimony concerning income for those years was incorrect, and that, for those years, his income amounted to about $20,000 or $25,000 (Tr. 1675, 1697). He said that his testimony as to his net worth in July 1958 was not true, and that he was incapable of giving a correct figure (Tr. 1698–1699).

2. Before trial, at the conclusion of the *voir dire* examination of the jury, the court instructed the jury that they were to determine the facts of the case, that the court "may not encroach upon [that] duty," and that the court had "no purpose" to do so (II. 49). The court told the jury that they were to apply the law to the facts, that questions asked of witnesses were not to be considered as evidence, that they were not to draw any inferences from questions of counsel, and that they were to disregard any testimony which might be stricken during the course of the trial (II. 50–52). The court also said that the opening statement from the government would not constitute evidence; that the evidence would come only from the witnesses in the case and the documents or objects introduced into evidence at the trial; that the petitioner was presumed to be innocent of the charges; and that the petitioner need not prove anything (II. 50, 53–56).

3. The trial lasted from March 1, 1960, to March 18, 1960. The government called twenty-nine witnesses to the stand, and offered into evidence or identified

over 850 exhibits. The petitioner was the sole witness for the defense. During the trial, the court asked numerous questions of the witnesses, including the petitioner.[4] No objection was made at any time during the trial to the extent of the court's questioning of witnesses or participation in the proceedings. During his closing argument to the jury, counsel for the petitioner thanked the court "for the conduct of this trial" (Tr. 2115; see also Tr. 1821).

During the trial, the court admonished the jury as follows (Tr. 1318):

> Members of the jury, I have been asking questions but only—and that is whether it is one witness or another witness—only and solely for the purpose of bringing out what I thought would make the testimony clearer. You are to attach no significance to any questions asked by the court. Just as I told you in the beginning, the fact a question is asked by the court is no different than any question asked by any counsel. ***Both counsel have a right and, indeed, it is their duty to object to any question asked by the court if it is an improper question.*** [Emphasis added.]

In its instructions to the jury, the court charged that the jury was the sole and exclusive judge of the facts and the credibility of the witnesses; and that their determination of the facts, apart from what the court might have said during the instructions or what

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[4] Out of approximately 10,000 questions asked of witnesses during the trial, the court asked approximately 3,200, or about one-third of all the questions asked at the trial. The same ratio applied with respect to questions the court addressed to petitioner.

the attorneys might have said, is "final, conclusive and controlling" (Tr. 2184–2185, 2214–2215, 2218–2220). The court charged further (Tr. 2216–2217):

> During the course of the trial I have at various times asked questions of certain witnesses, including the defendant. My object in doing so, and my sole object in doing so, was to bring out in greater detail certain facts which I thought might properly have a bearing upon the guilt or innocence of the defendant and help you in your deliberations. You are not to infer from any question that I asked to the defendant or any other witness that I have any opinion as to the facts to which the question is related. The court has no opinion on what your verdict should be in this case, and even if I did have such an opinion, in good conscience and the proper administration of judicial justice I would refrain from expressing it. But don't try, as I told you before, to second guess. It is your opinion, your opinion alone, gathered and formed from a careful and deliberate consideration of all the evidence in the case which counts.
>
> Now I haven't expressed an opinion, and I haven't intended to convey to you any views that I may have at all as to the guilt or innocence of the defendant, as to the credibility of the defendant or any other witness. Those matters lie solely within your province as jurors and I would not presume to encroach upon that province.
>
> You should not draw any inference from such remarks or rulings of the court that the court was intending to convey to you in any manner whatsoever its views or opinion as to what the

> verdict or decision of the jury should be. Such comments as the court may have made in that regard were only pursuant to the power and, indeed, the duty of the court to supervise the orderly trial of the case and to expedite it.

The court stated that the foregoing instruction was "such an important subject" that it would bear repetition and did repeat it. (Tr. 2117–2118.)

ARGUMENT

The sole issue before this Court is whether the extent of the trial court's questioning of witnesses deprived the petitioner of a fair trial. Petitioner concedes "that a trial judge not only has the right but the duty to intervene and participate in the examination of witnesses to clarify relevant facts and uncover the truth for the benefit of the jury *where this is not being accomplished by counsel*" (Pet. 61, emphasis in original).

Although the Statement portion of the petition presents a series of extended and unexplained quotations from the record of the examination of petitioner and four other witnesses (Pet. 10–54), petitioner does not in this Court point to any particular questions asked of witnesses as grounds for his claim that the court violated this standard (Pet. 55–62). In essence, his position is that no such showing is necessary where the number of questions asked by the court exceeds a certain mathematical percentage of those propounded during the entire trial. Thus, the petitioner rests upon a series of mathematical computations summing up the number of questions put by the court, the interruptions by the court, and the number of transcript

pages devoted to answers to questions propounded by the court. As noted by the court of appeals, however, there is no basis for the adoption of such a *per se* rule (XVI. 6; Pet. App. 3):

> * * * no case has been cited or found where a judgment has been reversed solely because of the quantity of the Judge's participation in the examination of witnesses. Where undue participation of the Judge in the trial has been a factor in a reversal of a judgment, it has been the quality of the participation rather than the quantity * * *

Whether to participate in the questioning is properly and necessarily left to the court's discretion. *Glasser* v. *United States*, 315 U.S. 60, 82. The existing standard protects the rights of defendants by giving the court discretion to participate in the examination of witnesses as necessary to insure a fair trial while, at the same time, making such participation grounds for reversal wherever so much as a single question is shown to have prejudiced the accused.[8]

While the court did ask numerous questions of the witnesses (see the Statement, *supra*), there was no impropriety in its action. *United States* v. *Giallo*, 206 F. 2d 207, 209 (C.A. 2), affirmed *per curiam*, 346 U.S. 929. The questions were designed to clarify and elicit relevant testimony in order to enable the jury to understand the evidence and its relation to the issues to be

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[8] [A] thorough examination of the entire record fail[ed] to convince [the] court [of appeals] that appellant suffered any bias or prejudice" from the court's examination of witnesses (XVI. 6; Pet. App. 2).

tried. The case was a complicated one. The charges and evidence spanned the period from December 1953 to May 1959. The government called twenty-nine witnesses to the stand and offered for identification or into evidence over 850 exhibits. Many of the exhibits and much of the testimony related to banking and financial transactions, banking policy and functions, financial statements, interrelationships and operations of various corporations and business ventures in which the petitioner had interests, and conversations and transactions which had occurred long before trial (see *e.g.*, Tr. 49–53, 55–58, 71, 76–78, 87–88, 101–102, 120–126, 138–145, 150–151, 179–180, 301–308, 352–361, 431–452, 460–462, 1343–1347, 1457–1464, 1574–1580, 1624–1625, 1674–1714, 1751–1772). The court had the right and the duty to clarify and assist in the development of the facts, "and it is no ground of complaint that the facts so developed may hurt or help one side or the other." *United States* v. *Rosenberg,* 195 F. 2d 583, 594 (C.A. 2), certiorari denied, 344 U.S. 838. See *Simon* v. *United States,* 123 F. 2d 80, 83 (C.A. 4), certiorari denied, 314 U.S. 694; *Morrissey* v. *United States,* 67 F. 2d 267, 278 (C.A. 9), certiorari denied, 293 U.S. 566; Wigmore, *Evidence* (3rd ed.) Sec. 784.

The record shows that the court was careful to protect the petitioner's rights. Thus, when a morals issue might possibly have crept into the case regarding the testimony of one Tanya Kim, the court indicated to government counsel at a bench conference that it did not want to have testimony elicited which might be "disgraceful" to the petitioner or which

might subject him to "ridicule or contempt" (Tr. 861–863). In addition, in the course of testimony with respect to petitioner's tax returns, the court on its own motion admonished the jury that the petitioner was not on trial for anything regarding the income tax laws, that the court did not mean to imply that he had violated any income tax law, and that the tax returns and testimony with respect to them had relation only to the issue of credibility (Tr. 1820–1821).

Moreover, the court was careful to admonish the jury during the trial that it was asking questions of the witnesses for the sole purpose of clarifying testimony, and that the jury was not to attach any significance to its conduct in that regard (Tr. 1318). It repeated and emphasized this admonition on two occasions in its charge to the jury. See the Statement, *supra*. That the jury followed these instructions, as it is presumed to do (see *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95), is evident from the fact that, during its deliberations, the jury called for and received a portion of the testimony of a particular witness (Tr. 2229–2234).

Finally, the petitioner has no standing to raise the issue of the trial court's conduct in this Court because he did not at any time lodge an appropriate objection thereto in the trial court. The petitioner, who is now represented by new counsel, suggests (Pet. 59) "that [trial] counsel probably correctly surmised that an objection would be of no avail under the circumstances."* During the trial, however, the

* The court of appeals noted that "Counsel who took the lead in representing appellant at the trial is a competent, experienced, well-qualified lawyer" (XVI. 5; Pet. App. 2).

court specifically indicated that counsel had a right and a duty to object to any questioning of witnesses by the court which counsel felt was improper (Tr. 1318). As pointed out by the court of appeals, "counsel did on occasion object to specific questions asked by the Judge, and on other occasions differed sharply and forcefully with the Judge. * * * Not only did the trial counsel not object to the Judge intruding into the examination of witnesses, but on at least one occasion he invited the court to conduct the examination" (XVI. 5; Pet. App. 2). Further, although defense counsel objected in many instances on other matters, he did not object to the amount of the court's questioning; on the contrary, he thanked the judge for the manner in which he conducted the trial. See the Statement, *supra*, p. 6.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1962.

U. S. GOVERNMENT PRINTING OFFICE: 1962